FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1977

BETH ISRAEL HOSPITAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 49–59) is reported at 554 F. 2d 477. The decision and order of the National Labor Relations Board (Pet. App. 21–47) are reported at 223 NLRB 1193.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1977. The petition for a writ of certiorari was filed on July 27, 1977, and granted on January 16, 1978 (A. 143). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that a hospital violated the National Labor Relations Act by issuing and maintaining rules that prohibit employees during non-working time from soliciting union support and distributing union literature in the hospital cafeteria and coffee shop.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Petitioner Beth Israel Hospital (hereinafter "the Hospital") is a non-profit health care institution that employs 2,200 persons excluding house staff (residents and interns), attending physicians, students, and employees of Harvard University who work on the premises (Pet. App. 25; A. 28).[1] These employees live in widely scattered areas and must commute to work at the Hospital, which is located in a congested urban area (Pet. App. 38–39, 42; A. 21–22, 28).

Since May 1970, the Hospital has issued an employee handbook, entitled "Working Together," containing Hospital rules as to employee conduct, including the solicitation and distribution of literature on Hospital property (Pet. App. 25–26; A. 57–59). In July 1974, the Hospital revised its restrictions on solicitation and distribution of litera-

[1] The National Labor Relations Act was amended, effective August 25, 1974, to extend its coverage and protection to employees of non-profit health care institutions. 88 Stat. 395 (29 U.S.C. (Supp. V) 152 (14)).

ture,[2] promulgating the following rule, which remained in effect until the issuance of the Board's original complaint in this case (Pet. App. 28–29; A. 65–67):

> Hospital employees who want to solicit other employees for the Union or other causes may do so when they are not on their own working times, but only in two well-defined locations of the Hospital:
>
> (1) Employee-only areas—employee locker rooms and certain adjacent rest rooms; and
>
> (2) Cafeteria and coffee shop.
>
> In the locker areas literature may be offered. In the cafeteria and coffee shop, conversations may take place on a one-to-one basis but there is to be no setting up of special tables, public distribution of literature nor any form of coercion. Elsewhere within the Hospital, including patient-care and other work areas, the lobbies, corridors, elevators, libraries, meeting rooms, etc., there is to be no solicitation nor distribution of literature. Soliciting of patients and visitors is expressly prohibited at all times and places.

The Hospital's cafeteria and coffee shop, which are adjacent, are open to employees, patients, and visitors (Pet. App. 39; A. 7–8, 11–13, 45–48, 56, 59, 109, 122,

[2] The revisions were prompted by a decision of the Massachusetts Labor Relations Commission on an unfair labor practice charge that had been filed against the Hospital before it became subject to the National Labor Relations Act (Pet. App. 27).

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123–125). These eating facilities are located on the second floor of the Hospital, where they are separated from the main lobby by a corridor. The cafeteria contains two serving lines, as well as a number of vending machines; it has a seating capacity of 275. The coffee shop also contains vending machines and has a seating capacity of 30 to 40 people. (Pet. App. 39; A. 7–9, 16–17, 56, 109, 111–114.) There is no employee-only eating facility in the Hospital (A. 13).

The coffee shop is open 24 hours a day, and the cafeteria is open at various times from 6:30 a.m. to midnight (Pet. App. 39; A. 7, 8–9, 28–29, 122).[3] A survey of cafeteria use conducted by the Hospital indicated that the average daily volume of individuals using the cafeteria serving lines is approximately 1,500 (A. 6–8). This survey also indicated that, of the meals served in the cafeteria, employees purchased 77 percent,[4] visitors 9 percent,[5] and patients only 1.56 percent (Pet. App. 39; A. 123–125).[6] Meals are pro-

[3] In the cafeteria, breakfast is served from 6:30 a.m. to 9:00 a.m.; lunch from 11:30 a.m. to 1:30 p.m.; and dinner from 4:00 p.m. to 6:30 p.m. The cafeteria service lines are also open from 9:00 a.m. to 9:45 a.m., for the morning coffee break, and also from 10:30 p.m. to midnight, primarily for the house staff (A. 7, 8–9, 28–29, 122).

[4] The employees are given a lunch period of 30 minutes and a ten minute relief or "coffee break" period in the morning and afternoon (A. 56).

[5] Normal visiting hours are from 2:30 p.m. to 8:00 p.m. (A. 8). The heaviest use of the cafeteria by visitors is in the evening (A. 123, 124).

[6] Students, volunteers, attending physicians and others purchased the balance of the meals served (A. 123–125).

vided to patients on the various floors of the Hospital; those patients using the cafeteria and coffee shop are reasonably ambulatory (Pet. App. 39; A. 38, 45–46, 121).

The Hospital utilizes the cafeteria area to communicate with the employees for a number of employee activities. Posters publicizing a Hospital cost reduction drive and charity campaigns have been placed in the area. In addition, tables have been set up to promote special campaigns and for the distribution of literature and pledge cards during the Hospital's annual United Fund drive.[7] A registration table has also been set up outside the north entrance of the cafeteria to assist employees who wished to join the Hospital credit union. Employee social functions have also been held by the Hospital in the cafeteria. (Pet. App. 33, 40; A. 5, 6, 9, 17, 22–28, 34, 43–44, 111, 113–115, 126.)[8]

On October 25, 1974, while the Hospital's no-solicitation/no-distribution rule was in effect, Ann Schunior, a Hospital research technician, distributed

[7] Since at least 1966, the Hospital, which is a constituent agency of the Combined Jewish Philanthropies, has allowed solicitation and distribution of literature for this charity and for the United Fund (Pet. App. 33; A. 9, 43–44, 50–51).

[8] The Hospital has also permitted a travel brochure rack to be set up in the cafeteria, and there is a table on which are placed commercial solicitations, such as brochures and applications for insurance programs, tennis camps, magazine subscriptions, and film processing. A car-pool board is also posted in the same corner of the cafeteria. (Pet. App. 33; A. 6, 12, 13–14, 38–39, 109, 112–113.)

an issue of "As We See It," a union newsletter,[9] in the cafeteria, on her lunch hour. She went from table to table and asked people whom she recognized or thought were employees whether they would like a copy of the newsletter. When Schunior was in doubt as to someone's employee status, she first asked if that person was an employee and explained that she was passing out literature for employees. (Pet. App. 31; A. 35, 37–38, 42.) [10]

While Schunior was distributing the union newsletter in the cafeteria, she was given an oral warning by the Hospital's general director that she was violating the Hospital's rules. Subsequently, she received written notification that further violations would result in dismissal. (Pet. App. 29, 32; A. 42, 73–75.)

On February 21, 1975, upon a charge filed by the Union, the Board's Regional Director issued a complaint alleging that the Hospital had violated Section 8(a)(1) and (3) of the National Labor Relations Act ("the Act"), 61 Stat. 140, 29 U.S.C. 158(a)(1) and (3), by promulgating and maintaining a rule that

[9] Schunior was distributing the October 1974 issue of a newsletter that was published monthly by the Massachusetts Hospital Workers Union, Local 880, Service Employees International Union, AFL–CIO (the "Union"). It contained articles by Hospital employees about their working conditions. (A. 42, 83–96.)

[10] Schunior testified that she was able to recognize the faces of people she saw regularly in the cafeteria, and that she was able to distinguish employees from patients and visitors because many employees wear uniforms and most of them wear Hospital name tags. She added that, while outpatients could not be readily distinguished from visitors, she could tell the employees from others in the cafeteria because visitors "generally look lost" and inpatients wear Hospital wrist bands and generally appear in their bedclothes. (Pet. App. 31; A. 36–38.)

barred distribution of union literature and restricted union solicitation in the cafeteria and coffee shop, and by applying that rule to Schunior (Pet. App. 24). Thereafter, the Hospital modified its rule to prohibit even one-to-one solicitation in the cafeteria and coffee shop.[11] Thus, under the revised rule, solicitation, like distribution of literature, is totally prohibited in the cafeteria and coffee shop area, and is limited to employee-only areas—employee locker rooms and certain adjacent rest rooms[12] (Pet. App. 30; A. 70–71).[12] The complaint was amended to include the Hospital's revised rule (Pet. App. 23).

[11] The new rule, set forth in a Hospital newsletter dated March 6, 1975, reads as follows (Pet. App. 30; A. 70–71):

"There is to be no soliciting of the general public (patients, visitors) on Hospital property. Soliciting and the distribution of literature to B.I. employees may be done by other B.I. employees, when neither individual is on his or her working time, in employee-only areas—employee locker rooms and certain adjacent rest rooms. Elsewhere within the Hospital, including patient-care and all other work areas, and areas open to the public such as the lobbies, cafeteria and coffee shop, corridors, elevators, gift shop, etc., there is to be no solicitation nor distribution of literature.

"Solicitation or distribution of literature on Hospital property by *non-employees* is expressly prohibited at all times.

"Consistent with our long-standing practices, the annual appeal campaigns of the United Fund and of the Combined Jewish Philanthropies for voluntary charitable gifts will continue to be carried out by the Hospital."

[12] Lockers are scattered throughout the Hospital in approximately 63 locations. However, in the employee-only areas, there are only four large locker rooms and two smaller rooms, containing 613 lockers, that are accessible to employees from all departments. In addition, there are locker areas, containing 470 lockers, which, because of security precautions, are accessible only to em-

B. THE BOARD'S CONCLUSIONS AND ORDER

The Administrative Law Judge concluded that the Hospital's restrictions on solicitation and distribution of literature in the cafeteria and coffee shop violated Section 8(a)(1) of the Act, and that the Hospital also violated Section 8(a)(3) and (1) by threatening employee Schunior with discharge if she continued to distribute literature in the cafeteria (Pet. App. 43). He found that the Hospital permitted solicitation in the cafeteria for non-union matters, that there were few places other than the cafeteria where employees could meet on Hospital premises to discuss non-work related matters, and that the surrounding neighborhood was congested and afforded no ready access to employees (Pet. App. 40–42). He added (Pet. App. 42):

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ployees who are assigned lockers there. Most of the locker locations are also restricted on the basis of sex. (Pet. App. 38; A. 30–33, 35–36, 127–134.)

The Hospital, itself, does not generally utilize the locker rooms and locker areas to communicate with employees (Pet. App. 38; A. 26, 35–36, 64, 71). Instead, newsletters containing communications from the Hospital's general director are distributed with the employees' paychecks in each department or work area (Pet. App. 32, 40; A. 21, 42–43). These newsletters have been used by the Hospital for a variety of solicitations (Pet. App. 40; A. 126, 135). They have also been used by the general director to express the Hospital's opposition to unionization and to respond to issues raised in the Union's monthly newsletter (Pet. App. 41; A. 61–64, 65–66). In one newsletter, for example, the general director stated that "a union has no place at Beth Israel Hospital" and that "the union's primary concern today is the thousands of dollars they will gain from employees' dues, dollars to come directly out of your pocket" (Pet. App. 41; A. 61–62).

> * * * I am not persuaded that the [Hospital] has offered any convincing evidence to demonstrate that the rule is needed, either by reason of actual or suspected interference with patients, visitors or non-employees. Thus, I am unable to find that the [Hospital] has made a sufficient showing of impairment with its principal obligation, namely, the care of patients, to justify the rule.

The Board upheld the Law Judge's findings and conclusions (Pet. App. 21–22). However, it added in a footnote, citing its intervening decision in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150, that the Hospital "also violated Sec. 8(a)(1) by maintaining an overly broad no-solicitation, no-distribution rule that prohibited all solicitation and distribution in all areas to which patients and visitors have access and employees have access during non-working time other than immediate patient care areas" (Pet. App. 21–22, n. 2).[18]

The Board ordered the Hospital to "[r]escind its written rule prohibiting distribution of union literature and union solicitation in its cafeteria and coffee shop," to expunge from Schunior's personnel record the written warning issued to her because of her dis-

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[18] In *St. John's Hospital and School of Nursing, Inc.*, *supra*, the Board held that a hospital rule barring employee solicitation and distribution in any area to which patients and visitors have access was overly broad. Although such activities could be prohibited in immediate patient care areas, restrictions in other areas open to patients and visitors as well as off-duty employees were presumptively invalid.

tribution of union literature in the cafeteria, and to cease and desist from interfering "in any like or related manner" with its employees' rights under Section 7 of the Act, 29 U.S.C. 157 (Pet. App. 22, 44–45).

C. THE DECISION OF THE COURT OF APPEALS

The court agreed with the Board that the Hospital had failed to establish special circumstances justifying its prohibition on employee solicitation and distribution in the cafeteria and coffee shop, and it enforced the Board's order as applied to those areas (Pet. App. 54–56, 59). However, noting the absence of any record evidence pertaining to the impact of employee solicitation and distribution in other public areas, the court held that the Board's decision and order determined "no more than the status of the cafeteria and coffee shop" (Pet. App. 57–58). It therefore refused to interpret the Board's footnote citing *St. John's Hospital and School of Nursing, Inc., supra,* as expressing a Board determination that the Hospital rule was also invalid as applied to other areas not devoted to immediate patient care. The court accordingly held that the Hospital was not collaterally estopped from further litigating the validity of its rule in such areas (Pet. App. 50).[14]

[14] The application of the rule to these other areas is being litigated before the Board in a second case involving the Hospital. See *Beth Israel Hospital*, cases 1–CA–11469, et al., JD–846–77 (Pet. Br. 46–50).

The court also refused to enforce the Board's broad cease and desist order on the ground that no proclivity to violate the Act had been shown (Pet. App. 58–59).

SUMMARY OF ARGUMENT

Section 7 of the National Labor Relations Act guarantees to employees the right to "form, join, or assist labor organizations" or "to refrain" from such activities. This guarantee encompasses the right of the employee to be informed concerning that choice at the place of work.

However, Section 7 rights are not absolute, and the Board must work out an adjustment between the employees' right of self-organization and the equally undisputed right of employers to maintain discipline in their establishments. Thus, the Board, with court approval, has long held that an employer may lawfully adopt a rule prohibiting employee solicitation and distribution of literature during working time on his premises. But a similar rule prohibiting employee solicitation during non-working time, or distribution of literature during non-working time in non-working areas, is invalid unless the employer establishes that special circumstances make the rule necessary in order to maintain production or discipline.

Petitioner erroneously contends that, when Congress enacted the 1974 Health Care Amendments (88 Stat. 395), it intended that different principles as to no-solicitation/no-distribution rules would be applied to hospitals because of their patient care functions. While Congress recognized the need to avoid disruptions of patient care, it was also concerned that employees of non-profit hospitals should not be excluded from the

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rights of self-organization guaranteed other employees under the Act. Accordingly, it relied on the Board to continue to make the necessary adjustments between the rights and interests of hospital employees, patients, and employers in this area.

In *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150, the Board struck a balance between these rights and interests. Recognizing that "the primary function of a hospital is patient care" (*ibid.*), the Board concluded that in immediate patient care areas, a hospital may be warranted in imposing more stringent restrictions on employee solicitation and distribution than are generally permitted under the Board's established principles. However, the Board also concluded that these general patient care considerations were not sufficient, alone, to justify a hospital's restrictions on employee organization activity in other areas accessible to patients and visitors. Accordingly, in other than immediate patient care areas, a ban on employee solicitation and distribution would be invalid absent a showing by the hospital that special circumstances made the ban necessary to maintain patient care or employee discipline. The present case involves only the validity of the *St. John's* rule as applied to hospital eating facilities.

The Hospital's cafeteria and coffee shop are used primarily by the employees, since there is no employee-only eating facility in the Hospital. These eating facilities are natural places for employees to talk about matters of mutual concern such as unions. Moreover, the employees lack other adequate areas for commu-

nication both inside and outside the Hospital. Thus, the harm to employee organization rights in banning solicitation and distribution in the cafeteria and coffee shop would be substantial. On the other hand, the likelihood that such activity would disturb the few patients and visitors using these facilities is minimal. A certain amount of noise and activity is inevitable in such semi-public eating facilities, and there is no more reason for hospital visitors or patients to be upset by employees discussing union activities or exchanging union literature among themselves in a quiet, non-disruptive manner, than by other solicitation activity permitted by the Hospital.

The Board therefore reasonably concluded that the Hospital's ban on employee solicitation and distribution in the cafeteria and coffee shop was presumptively unlawful and placed the burden on the Hospital to establish, by probative evidence, that such a ban was nonetheless necessary to maintain patient care or employee discipline. The Board and the court below properly concluded that the Hospital failed to sustain this burden.

The Hospital contends (Br. 30–34, 41–43) that its prohibition on solicitation and distribution of literature in the cafeteria and coffee shop must be judged by the same standards applied by the Board to retail stores and restaurants. But the Board has broad discretion to determine the applicability of such standards to varying factual situations. That discretion was properly exercised in concluding that the considera-

employees to be informed concerning that choice." "The place of work is a place uniquely appropriate for the dissemination of views concerning a bargaining representative and the various options open to the employees." *National Labor Relations Board* v. *Magnavox Co.*, 415 U.S. 322, 325; see also *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 801, n. 6.

However, Section 7 rights are not absolute. The Board must work out "an adjustment between the undisputed right of self-organization assured to employees * * * and the equally undisputed right of employers to maintain discipline in their establishments." *Republic Aviation Corp.* v. *National Labor Relations Board, supra*, 324 U.S. at 797–798. The Board, with court approval, has evolved, and long applied, the following principles in determining the legality of an employer's regulation of employee solicitation and literature distribution with respect to Section 7 matters on his premises: Since working time is for work, a rule prohibiting employee solicitation and distribution during working time[16] is presumptively

[15] As this Court stated in *Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539, 543: "[O]rganization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights."

[16] "Working time" in this context means the period of time spent in the performance of actual job duties and does not include meal or break periods. *Essex International, Inc.*, 211 NLRB 749–750.

tions that warrant more stringent restrictions on employee solicitation and distribution in the public areas of retail stores and restaurants are not applicable to hospital eating facilities. The main function of such purely commercial establishments is selling their goods and services to their customers, and this function might well be disrupted by such employee activity in the places where the sales occur. In contrast, a hospital's main function is patient care, which is unlikely to be disrupted by employee solicitation and distribution in the hospital's eating areas. Such areas are for this purpose more closely analogous to plant lunchrooms and cafeterias, where employee solicitation and distribution during non-working time is protected by the Act.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT THE HOSPITAL VIOLATED THE NATIONAL LABOR RELATIONS ACT BY ISSUING AND ENFORCING NO-SOLICITATION/NO-DISTRIBUTION RULES THAT PROHIBIT EMPLOYEES DURING NON-WORKING TIME FROM SOLICITING UNION SUPPORT AND DISTRIBUTING UNION LITERATURE IN THE HOSPITAL CAFETERIA AND COFFEE SHOP

A. IN EXTENDING THE ACT'S PROTECTIONS TO EMPLOYEES OF NONPROFIT HOSPITALS IN 1974, CONGRESS INTENDED THE BOARD TO APPLY SETTLED PRINCIPLES TO ACCOMMODATE EMPLOYER AND EMPLOYEE RIGHTS CONCERNING UNION SOLICITATION AND DISTRIBUTION

Section 7 of the National Labor Relations Act guarantees employees the right "to form, join, or assist labor organizations" or "to refrain" from such activities. Implicit in this guarantee is the right of

valid. On the other hand, since non-working time is an employee's time to use as he wishes, a rule prohibiting employee solicitation during non-working time, or distribution of literature during non-working time in non-working areas, is invalid, unless the employer establishes that special circumstances make the rule necessary in order to maintain production or discipline. *Republic Aviation Corp.* v. *National Labor Relations Board, supra,* 324 U.S. at 803, n. 10 (quoting with approval *Peyton Packing Company,* 49 NLRB 828, 843–844); *National Labor Relations Board* v. *Babcock & Wilcox Co.,* 351 U.S. 105, 113; *National Labor Relations Board* v. *Magnavox Co., supra,* 415 U.S. at 325–326; *Stoddard-Quirk Mfg. Co.,* 138 NLRB 615, 616–621.[17]

Petitioner does not dispute the validity of these principles as applied to facilities other than a hospital. Its basic contention is that Congress, in enacting the 1974 Health Care Amendments (note 1, *supra*), intended that different principles would be applied to hospitals. Thus, petitioner argues that "the unique

[17] Accord: *National Labor Relations Board* v. *United Aircraft Corp., Pratt & Whitney Div.,* 324 F. 2d 128, 129–131 (C.A. 2), certiorari denied, 376 U.S. 951; *National Labor Relations Board* v. *Monarch Machine Tool Co.,* 210 F. 2d 183, 186–187 (C.A. 6), certiorari denied, 347 U.S. 967; *P.R. Mallory Co.* v. *National Labor Relations Board,* 389 F. 2d 704, 709 (C.A. 7); *James H. Matthews & Co.* v. *National Labor Relations Board,* 354 F. 2d 432, 440–441 (C.A. 8), certiorari denied, 384 U.S. 1002; *National Labor Relations Board* v. *Texas Aluminum Co., Inc.,* 300 F. 2d 315, 316 (C.A. 5); *Groendyke Transport, Inc.* v. *National Labor Relations Board,* 530 F. 2d 137, 141–142 (C.A. 10); *Food Store Employees Local 347* v. *National Labor Relations Board,* 418 F. 2d 1177, 1180 (C.A.D.C.).

nature of a hospital places it outside the scope of the traditional area of NLRB labor relations expertise" (Pet. Br. 13), and that only the hospital "possesses the medical expertise required to determine what rules are necessary to preserve the medical well-being of persons under its care" (Pet. Br. 18). Accordingly, in order to give effect to Congress' concern with the need to avoid disruption of patient care (Pet. Br. 10–11), it is not necessary for a hospital "to demonstrate the existence of 'special circumstances' to justify its rule. * * * [T]he unique nature of a hospital setting is in and of itself a special circumstance justifying a restriction on solicitation and distribution activity. * * * The burden is on the Board to justify its decision holding that the Hospital violated the Act by enforcing that rule" (Pet. Br. 19). Petitioner's position is erroneous.

While the legislative history of the 1974 amendments shows a recognition by Congress of the unique nature of health care institutions and of the need " 'to avoid disruption of patient care wherever possible' " (Pet. Br. 11), it also reflects congressional concern that non-profit hospital workers, performing the same functions as covered employees,[18] should not be excluded from the rights and benefits of self-organization guaranteed employees under the Act. 120 Cong. Rec. 16900 (1974) (remarks of Rep. Ashbrook), Legislative History of the Coverage of Non-profit Hospitals

[18] Employees of proprietary hospitals and of proprietary and non-profit nursing homes were already covered by the Act.

Under The National Labor Relations Act, 1974, prepared by the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 93d Cong., 1st Sess. 291 (1974) ("Leg. Hist."); S. Rep. No. 93–766, 93d Cong., 2d Sess. 3 (1974), Leg. Hist. 10; H.R. Rep. No. 93–1051, 93d Cong., 2d Sess. 4–5 (1974), Leg. Hist. 272–273. Indeed, the legislative history reflects the belief of Congress that extending the rights of self-organization to hospital employees would promote, rather than harm, patient care.[19]

Accordingly, though Congress enacted special provisions for strike notice and mediation in the health care industry, designed to avoid disruptions of patient

[19] See Vernon, *Labor Relations in the Health Care Field under the 1974 Amendments to the National Labor Relations Act*, 70 Nw. U. L. Rev. 202, 203–204 (1975): "Congress also believed the lack of unionization at * * * [non-profit] hospitals enabled them to maintain low wages and poor working conditions. This situation was thought to cause substantial employee frustration and turnover which, in turn, produced a low standard of care. Furthermore, the low wages and poor working conditions were considered the principal forces compelling employees to seek union representation and engage in disruptive strikes when hospital management denied them representation" (footnote omitted).

See also 120 Cong. Rec. 12936–12938 (1974) (remarks of Sen. Cranston and Sen. Williams), Leg. Hist. 91–97; 120 Cong. Rec. 16899–16900 (1974) (remarks of Rep. Thompson and Rep. Ashbrook), Leg. Hist. 288–291. Figures cited in the legislative history showed that two hospitals with annual employee turnover rates of 1200 to 1500 percent before unionization dropped to 24 to 30 percent a year after unionization. 120 Cong. Rec. 12937 (1974) (remarks of Sen. Cranston), Leg. Hist. 93–94; 120 Cong. Rec. 16899–16900 (1974) (remarks of Rep. Thompson), Leg. Hist. 289–290.

care through strikes,[20] it did not find it necessary, in the interest of patient care, to enact any statutory limitation on employee solicitation and distribution rights. Instead, Congress relied upon the Board to continue to exercise its pre-existing responsibility to make the necessary adjustments between the rights and interests of hospital employees, patients, and employers in this area.[21]

Accordingly, in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150, the Board struck a balance between the organizational rights of hospital employees and the need of the hospital to maintain

[20] Section 8(d) and (g) of the National Labor Relations Act (29 U.S.C. (Supp. V) 158(d) and (g)), and Section 213(a) of the Labor-Management Relations Act (as added, 88 Stat. 396, 29 U.S.C. (Supp. V) 183). See S. Rep. No. 93–766, *supra*, at 4–5, 6, Leg. Hist. 11–12, 13; S. Conf. Rep. No. 93–988, 93d Cong., 2d Sess. 4–5 (1974), Leg. Hist. 355–356.

[21] There is no support for petitioner's contention (Pet. Br. 14–15) that Congress was aware of, and intended to "freeze" into law, *Guyan Valley Hospital, Inc.*, 198 NLRB 107 (1972), where a "tendency" to disturb patients was held sufficient to justify enforcement of a no-solicitation rule in public areas of a hospital. *Guyan* was decided by a divided 3-member panel of the Board. It stood in sharp contrast to another divided panel decision, *Summit Nursing Convalescent Home*, 196 NLRB 769 (1972), enforcement denied, 472 F. 2d 1380 (C.A. 6). See also *Bellaire General Hospital*, 203 NLRB 1105 (1973). Moreover the Board may properly modify its construction of the Act in light of its cumulative experience. See *National Labor Relations Board* v. *Local 103, Ironworkers*, No. 76–719, decided January 17, 1978, slip op. 15–16; *National Labor Relations Boards* v. *Weingarten, Inc.*, 420 U.S. 251, 265–267; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 347–349, 350–352.

patient care." Recognizing that "the primary function of a hospital is patient care and that a tranquil atmosphere is essential to carrying out that function" (*ibid.*), the Board concluded that a hospital may be justified in imposing more stringent restrictions on employee solicitation and distribution of literature than are permitted under established principles. Thus, the Board held that a hospital may lawfully ban employee solicitation and distribution, even during non-working time, in all immediate patient care areas, such as the patients' rooms, operating rooms, and X-ray and therapy facilities. For, "[s]olicitation at any time in those areas might be unsettling to the patients—particularly those who are seriously ill and thus need quiet and peace of mind." *Ibid.*

However, the Board also concluded that these general patient care considerations were not sufficient, alone, to justify a hospital's restrictions on employee organizational activity in all other areas accessible to patients and visitors. The Board explained (222 NLRB 1150–1151):

> As to the restriction in visitor access areas other than those involved in patient care, the possibility of any disruption in patient care resulting from solicitation or distribution of literature is remote. As to the restrictions in patient access areas such as cafeterias, lounges, and the like, we do not perceive how patients would be affected adversely by such activities.

[22] *St. John's* was a unanimous decision by the full Board. The American Hospital Association and District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL–CIO, filed briefs *amici curiae* in that case. 222 NLRB 1150.

> On balance, the interests of patients well enough to frequent such areas do not outweigh those of the employees to discuss or solicit union representation.

Accordingly, in areas other than those devoted to immediate patient care, a ban on all employee solicitation and distribution would be invalid absent a showing by the hospital that special circumstances made the ban necessary in order to maintain patient care or employee discipline.

The present case involves only the validity of the *St. John's* principle as applied to hospital eating facilities. The court below found that the validity of the Hospital's rule as applied to the areas other than the cafeteria and coffee shop was not litigated in this proceeding (*supra,* p. 10), and the Board did not seek review of the court's ruling on that question. Accordingly, the question whether the same principle respecting employee solicitation and distribution in hospital eaing facilities may properly be applied to other areas to which patients have access, but which are not involved in direct patient care, is not presented in this case.[23]

[23] The Seventh Circuit has found the Board's *St. John's* principle to be "both logical and just," as applied to both hospital eating facilities and other patient access areas not devoted to immediate patient care. *Lutheran Hospital of Milwaukee, Inc.* v. *National Labor Relations Board*, 564 F. 2d 208, 215–216 (C.A. 7), petition for a writ of certiorari filed March 14, 1978. No. 77–1289. However, the accommodation reached by the Board as to both eating facilities and other areas has been rejected by the Tenth and the District of Columbia Circuits. *St. John's Hospital and School of Nursing, Inc.* v. *National Labor Relations Board*, 557 F. 2d 1368 (C.A. 10); *Baylor University Medical Center* v. *National Labor Relations Board*, C.A.D.C. No. 76–1940, decided February 14, 1978, 97 LRRM 2669.

In sum, the basic question here is whether the Board made a reasonable accommodation between employee organizational rights and the Hospital's need to maintain patient care in concluding that its ban on employee solicitation and distribution with respect to union matters in the cafeteria and coffee shop was an impermissible infringement of the employees' Section 7 rights, absent proof by the Hospital that special circumstances made such a ban necessary in order to maintain patient care or employee discipline.[24] We show below that the balance struck by the Board is reasonable, and thus entitled to stand. See *National Labor Relations Board* v. *Weingarten,* 420 U.S. 251, 267; *National Labor Relations Board* v. *Erie Resistor Corp.,* 373 U.S. 221, 236; *National Labor Relations Board* v. *Truck Driver's Union,* 353 U.S. 87, 96.

[24] Contrary to petitioner's contention (Pet. Br. 21) the Board is not required to "demonstrate by substantial evidence that it would be improper for the Hospital to enforce its rule in the cafeteria." The requirement that the Board's unfair labor practice findings be based on substantial evidence "does not go beyond the necessity for the production of evidential facts, * * * and compel evidence as to the results which may flow from such facts. * * * An administrative agency * * * may infer * * * from the proven facts such conclusions as reasonably may be based upon the facts proven." *Republic Aviation Corp.* v. *National Labor Relations Board, supra,* 324 U.S. at 800. It may also adopt presumptions, based on its cumulative experience, the validity of which "depends upon the rationality between what is proved and what is inferred." *Id.* at 805.

B. THE BOARD PROPERLY CONCLUDED THAT THE EMPLOYEES' SECTION 7 RIGHT TO ENGAGE IN UNION SOLICITATION AND LITERATURE DISTRIBUTION IN THE CAFETERIA AND COFFEE SHOP OUTWEIGHED ANY POSSIBLE HARM TO PATIENTS, AND THEREFORE THE BURDEN WAS ON THE HOSPITAL TO SHOW SPECIAL CIRCUMSTANCES JUSTIFYING A BAN ON SUCH ACTIVITY

The Hospital's cafeteria and coffee shop are used primarily by the employees, since there is no employee-only eating facility in the Hospital.[25] In contrast, patient use is relatively slight, since meals for patients are provided on the various floors of the Hospital.[26] As Judge Leventhal stated in *Baylor University Medical Center* v. *National Labor Relations Board, supra,* 97 LRRM at 2676 (dissenting opinion):

> It is only in the most general and noncritical sense that "patient care" is rendered in these areas. They are basically retreats, where patients, staff, and visitors may withdraw from immediate contact with patient care areas. They are natural places for employees to talk

[25] Cf. *St. John's Hospital and School of Nursing, Inc.* v. *National Labor Relations Board, supra,* where it was "stipulated that 80% or more of the employees use the employee-only lunchroom and cafeteria on a daily basis." 557 F. 2d at 1375. Indeed, the Tenth Circuit expressly distinguished the present case because of " 'the very substantial employee use of' the cafeteria and coffee shop and the apparent absence of comparable employee-only areas." *Id.* at 1376, n. 7.

[26] A survey of cafeteria use conducted by the Hospital shows that employees purchased 77 percent of the meals served, visitors 9 percent, and patients only 1.56 percent (*supra,* p. 4).

about matters of mutual concern such as unions. ["]

Indeed, the Hospital has used the cafeteria-coffee shop area to communicate with the employees and for a number of employee programs and social activities that were not related to patient care (*supra,* p. 5).

In addition, the cafeteria and coffee shop are the only areas of the Hospital where most of the employees could adequately be contacted while they were off-duty. As shown (*supra,* pp. 7–8, note 12), the locker rooms and rest areas, to which the Hospital rules would limit employee solicitation and distribution, are not accessible to the entire work force due to security restrictions and the division of locker areas by sex. The inadequacy of these areas for employee communication is further shown by the fact that the Hospital itself generally does not rely on the locker areas to dispense information to its employees. Instead, it depends upon its newsletters, which are distributed with paychecks in various work areas of the Hospital, and which have been used to express opposition to unionization.

[27] The court majority in *Baylor* did not disagree with this statement. While holding that "Baylor's ban on soliciting in the hospital corridors was justified due to the 'special circumstances' of a hospital environment," it held that "a similar proscription covering its cafeteria and vending area is justified because these areas are not materially 'special' or different from other restaurants and shops." *Baylor University Medical Center* v. *National Labor Relations Board*, *supra*, 97 LRRM at 2673. We show, *infra*, pp. 29–34, that the Board reasonably concluded that hospital eating facilities are different.

Finally, while the availability of alternative means of communication is not a relevant inquiry in the case of *employee* solicitation and distribution,[28] the building's surroundings also are inadequate for communicating with the employees due to the congested urban area in which the Hospital is located (Pet. App. 42; A. 18–21, 21–22)."[29]

The harm to employee organizational rights in banning solicitation and distribution in the cafeteria and coffee shop would thus be substantial. On the other hand, the likelihood that such activity would disturb the relatively few patients and visitors using those facilities is minimal. A certain amount of noise and activity is inevitable in such semi-public eating facilities. There is no more likelihood that hospital visitors or patients will be upset by employees discussing union activities or exchanging union literature among

[28] Cf. *National Labor Relations Board* v. *Babcock & Wilcox Co.*, *supra*, 351 U.S. at 113, where the existence of alternate means of communication was deemed a relevant consideration in striking the balance between the right of *non-employee* union representatives to organize on plant premises and the employer's interest in barring outsiders from his property. However, the Court emphasized that its decision was addressed to *non-employee* organizing activity and that "[n]o restriction may be placed on the *employees'* right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline" (emphasis added). See also *National Labor Relations Board* v. *Magnavox Co.*, *supra*, 415 U.S. at 326–327.

[29] Cf. *Baylor University Medical Center* v. *National Labor Relations Board*, *supra*, where the District of Columbia Circuit found that, while there were few indoor areas available for employee communication at this Dallas hospital, there were a number of outdoor areas surrounding the building that could be used "virtually all year" because of the mild climate. 97 LRRM at 2675.

themselves in a quiet, non-disruptive manner than that such persons will be upset by other conversations overheard in these areas or by other solicitation activity permitted by the Hospital.[20] As the Seventh

[20] The wide range of activities carried on in the Hospital cafeteria and coffee shop undermines the Hospital's claim that there is a legitimate need to prohibit union solicitation and distribution activities in these areas in the interest of maintaining a quiet, distraction-free atmosphere. The numerous charitable solicitations and commercial literature permitted in these eating facilities suggest that the Hospital, which has repeatedly expressed its opposition to unionization (A. 61–66), is quite willing to permit solicitation and distribution of literature, provided that it does not further employee self-organization. See *William L. Bonnell Co.* v. *National Labor Relations Board*, 405 F. 2d 593, 595 (C.A. 5); *National Labor Relations Board* v. *Electro Plastic Fabrics, Inc.*, 381 F. 2d 374, 376 (C.A. 4).

Petitioners suggest (Pet. Br. 35) that the solicitations permitted are "innocuous", while the employee solicitation and distribution of union literature is "potentially upsetting" (cf. *Baylor University Medical Center* v. *National Labor Relations Board*, *supra*, 97 LRRM at 2672 n. 29). But such things as posters urging employee efforts to reduce the Hospital's costs (A. 23–28) have at least an equal potential for upsetting patients prone to worry about the quality and cost of the care they are receiving as do overheard conversations concerning unionization, or the sight of the distribution of union literature. In fact, neither is likely to upset the few patients who are exposed to such matters. Indeed, even if the union newsletter were inadvertently to fall into patient hands, patients would necessarily have their own experiences against which to check the accuracy of the complaints about hospital procedures. Of course, statements in union newsletters expressing dissatisfaction with working conditions (see Pet. Br. 26–28), made as part of the employees' organizing efforts, fall within the protection of Section 7 of the Act. See *Community Hospital of Roanoke Valley, Inc.* v. *National Labor Relations Board*, 538 F. 2d 607, 608–610 (C.A. 4); *National Labor Relations Board* v. *Peter Cailler Kohler Swiss Chocolates Co., Inc.*, 130 F. 2d 503, 506 (C.A. 2).

Circuit has noted, "[l]abor unions are common entities in this country, and only an extraordinary patient would be so dismayed at witnessing an attempt to form one that his health would actually become impaired." *Lutheran Hospital of Milwaukee, Inc.* v. *National Labor Relations Board, supra,* 564 F. 2d at 215. A conversation concerning union representation would appear to be far less disturbing for a patient to overhear than would a discussion among doctors or nurses about the medical questions that are the subject of many off-duty conversations (A. 137–138).[21]

The Board therefore reasonably concluded that the Hospital's ban on employee solicitation and distribution in the cafeteria and coffee shop was presumptively unlawful and correctly placed the burden on the Hospital to establish, by probative evidence, that such a ban was nonetheless necessary to maintain patient care or employee discipline. The Board and the court below properly concluded that the Hospital did not sustain that burden.[22]

[21] The record shows that surgeons and students occasionally meet in the Hospital's cafeteria during breakfast to discuss medical questions (A. 52–53).

[22] Petitioners incorrectly suggest (Pet. Br. 30) that the decision below "would require the Hospital to demonstrate actual harm, i.e., a set-back in the recovery of a patient" in order to carry its burden. Instead, the court simply noted that the Hospital had shown no special circumstances, such as irresponsible employee behavior or overcrowded conditions, which would reasonably tend to show that patient care would be disrupted (Pet. App. 55; cf. *Baylor University Medical Center* v. *National Labor Relations Board*, *supra*, 97 LRRM at 2672).

The record shows (*supra*, pp. 5–6) that employee Schunior was careful not to include patients and visitors as recipients when she distributed union literature in the cafeteria. She was able to distinguish Hospital employees from patients and visitors,[33] and when in doubt she asked whether an individual was a Hospital employee before offering that person any union literature.

All that the Hospital offers in justification of its rule is the assertion (Pet. Br. 28–29) that it cannot take the risk that other employees will be as careful as Schunior was.[34] The court below properly found that this was insufficient to sustain the Hospital's burden of establishing special circumstances (Pet. App. 55–56):

[33] Most Hospital employees wear uniforms and name tags, and inpatients wear Hospital I.D. bracelets (A. 37–38, 48, 121).

[34] Nothing in the Board's decision or the court's enforcement of it limits the Hospital's authority to discipline employees engaging in solicitation and distribution of literature when they act in a disorderly or disruptive manner that disturbs patients, visitors, or other employees in any area of the hospital. Such behavior, whether related to union activity or not, can be adequately controlled under the Hospital's other established rules as to employee conduct (A. 57–59), without limiting employee organization rights in the cafeteria and coffee shop. In addition to restricting solicitation and distribution of literature on the Hospital premises, these rules prohibit "[i]mproper conduct towards patients or employees and interfering with their assigned work" (A. 57). Moreover, it is also a violation of these rules to engage in disorderly conduct on Hospital premises, to leave one's work station or department during working hours without prior permission, to enter restricted areas, such as operating rooms, without permission, and to loiter on the premises before or after working hours (A. 57–58).

> Beth Israel argues that its no-distribution rule will prevent the unions' "scurrilous" attacks on the hospital's health care from falling into the hands of patients or visitors. There was no evidence, however, that literature, offensive or otherwise, was distributed to patients or visitors. Employee Schunior testified that she took care to distribute only to employees. If in the future employee organizers deliberately distribute "scurrilous" literature to patients or visitors, the hospital may well have cause to discipline such employees. Cf. *NLRB* v. *Local 1229, IBEW* (*Jefferson Standard Broadcasting Co.*), 346 U.S. 464 (1953). In any event, the hospital cannot justify a rule prohibiting distribution to employees of all types of literature on the ground that some of the literature may be scurrilous. Such an argument might at most justify a rule directed at offensive literature. We conclude that the Board did not err in finding that the hospital had not justified its no-solicitation, no-distribution rule as it related to the cafeteria and coffee shop. [Footnote omitted.]

C. THE RETAIL STORE/RESTAURANT EXCEPTION IS INAPPLICABLE TO A HOSPITAL CAFETERIA AND COFFEE SHOP USED PRIMARILY BY EMPLOYEES

The Hospital contends (Br. 30–34, 41–43) that its prohibitions on solicitation and distribution of literature in the cafeteria and coffee shop must be judged by the same standards applied by the Board to retail stores and commercial restaurants. In the retail store context, the Board has held that employers may pro-

hibit solicitation on the selling floor, where it may be "disruptive of the * * * [store's] business"; and in public aisles, elevators, and escalators, where "solicitation carried on in such limited space may create traffic and safety hazards tending to disrupt and interfere with * * * [the] business to a serious degree." *May Department Stores Co.*, 59 NLRB 976, 981, enforced as modified, 154 F. 2d 533, 537 (C.A. 8), certiorari denied, 329 U.S. 725;[35] *Marshall Field & Co.*, 98 NLRB 88, 92, enforced as modified, 200 F. 2d 375 (C.A. 7). Likewise, in commercial restaurants, prohibitions on solicitation and distribution of literature in public areas have been upheld because such activities are likely to have an adverse effect on customer patronage. See *Marshall Field & Co., supra,* 98 NLRB at 94; *McDonald's of Palolo,* 205 NLRB 404, 407–408; *Bankers Club, Inc.* 218 NLRB 22, 27; *Marriott Corp. (Children's Inn)*, 223 NLRB 978.

[35] Although in *May Department Stores, supra,* 59 NLRB at 981, the Board stated that "solicitation * * * carried on on the selling floor, where customers are normally present, might conceivably be disruptive of the respondent's business," it did not thereby hold, as the Hospital argues (Br. 24, 30), that employers generally may prohibit any solicitation or distribution that could "conceivably be" harmful to their operations. Such a holding would be inconsistent with the rule later approved by this Court in *Republic Aviation Corp.* v. *National Labor Relations Board, supra,* 324 U.S. at 803, n. 10, that prohibitions on employee solicitation and distribution during nonworking time are presumptively unlawful unless the employer can demonstrate the existence of special circumstances that, in fact, make the prohibition necessary to the orderly and efficient operation of the business. This rule has "proved to be among the most stable and least disputed of all those provided by the Board." Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 93 (1964).

The Board has not applied these precedents to such areas as the Hospital's cafeteria and coffee shop because, in its considered judgment, the considerations that warrant the exception are not applicable to those areas. As the Board explained in *St. John's Hospital and School of Nursing, Inc.,* 222 NLRB 1150–1151, n. 3:

> [R]etail stores are justified in prohibiting solicitation on the selling floor since such solicitation, even on nonwork time, would be disruptive of the store's relationship with its customers in the pursuit of its main function, i.e., selling merchandise. [The hospital's] basic function is patient care. It has not been shown that the prohibitions here discussed are necessary to avoid disruption of that function.

As the Seventh Circuit added in *Lutheran Hospital of Milwaukee, Inc.* v. *National Labor Relations Board, supra,* 564 F. 2d at 214 (footnote omitted):

> A retail store's or a restaurant's primary function is selling merchandise. The sales floor of a store and the public area of a restaurant are where either business carries out the sale of merchandise, and are also where the public deals with the employees in their professional capacity. Thus, insofar as union organizational activities create an abnormal atmosphere on the sales floor or in the public areas, they interfere with the employees' job performance and disrupt the store or the restaurant's performance of its primary function.
>
> By contrast, the primary function of a hospital is to provide health care, and the areas of

> a hospital outside of immediate patient care areas are by definition not locations where the hospital's primary function is carried out or where the public deals with the employees in their professional capacity. Thus, while organizational activities conducted outside of immediate patient care areas might create an abnormal atmosphere where they took place, they would not interfere with the employees' job performance and therefore could not disrupt the hospital's performance of its primary function.

It is well established that the Board has broad discretion in drawing such distinctions, for "[the] Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." *Republic Aviation Corp.* v. *National Labor Relations Board, supra,* 324 U.S. at 798. See also *Bayside Enterprises, Inc.* v. *National Labor Relations Board,* 429 U.S. 298, 302–304; *National Labor Relations Board* v. *Weingarten, Inc., supra,* 420 U.S. at 266–267.[36] For the reasons set forth above, the

[36] As the Seventh Circuit added in *Lutheran Hospital of Milwaukee, Inc.* v. *National Labor Relations Board, supra,* 564 F. 2d at 214–215: "It is the Board's function to determine the applicability of the National Labor Relations Act to working conditions in a particular industry in light of the special conditions present in that industry, and it is not our role to 'insure an abstract and academic consistency in Board decisions' which draw distinctions between various industries. If the individual decision of the Board which is before us for review is supported by substantial evidence and based on correct legal reasoning, we must enforce it" (citations omitted).

court below properly concluded (Pet. App. 54, n. 2), that the Board's refusal to extend the retail store/restaurant exception to hospital eating facilities rests on rational grounds. Similarly, it is entirely rational for the Board to determine that hospital eating facilities are instead analogous to plant lunchrooms and cafeterias, where it is well-established that solicitation and distribution of literature during non-working time is generally privileged. See, *e.g., National Labor Relations Board* v. *Monarch Machine Tool Co., supra,* 210 F. 2d at 186–187.

Nor is a different conclusion required by petitioner's contention (Br. 44) that, irrespective of profit, the Hospital has an "independently valid interest" in the successful operation of the cafeteria. Cf. *Baylor University Medical Center* v. *National Labor Relations Board, supra,* 97 LRRM at 2674. The principal customers of the Hospital cafeteria are the employees, who have no other eating facility on the premises and who naturally regard the cafeteria as an area where they may discuss matters of mutual concern when they are off duty. To the limited extent that patients and visitors also patronize this eating facility, they do so because of its convenient location, not because of the quality of the food or ambience.[37]

In sum, as Judge Leventhal pointed out (*Baylor University Medical Center* v. *National Labor Rela-*

[37] The Hospital's recognition of this fact is demonstrated by its use of the cafeteria as a place for charitable solicitations and the display of commercial literature. See p. 5, note 8, *supra.*

tions Board, supra, 97 LRRM at 2676 (dissenting opinion)):

> To be sure, the hospital has a legitimate interest in a congenial atmosphere in its cafeteria—but it is not the kind of live-or-die imperative that must be given recognition even though it undercuts the rights of employees protected by the general *Republic* principle.
>
> * * * * *
>
> [T]he statute does not fairly contemplate that a hospital can confine its employees to the closets, and deny them protection in the places most natural for talk that is not patient-related, by leaning on the exception wrought for commercial enterprises to ensure survival.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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